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No. 05-1481

IN THE

Supreme Court of the United States

SIDLEY AUSTIN LLP,

Petitioner,

v.

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF

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REPLY BRIEF

In its Petition, Sidley Austin LLP ("Sidley") demonstrated that the decision below implicated a conflict among the courts of appeals on the issue whether conduct by individuals that bars them from seeking relief under the federal anti-discrimination laws bars the Equal Employment Opportunity Commission ("EEOC") from obtaining individual relief on their behalf. Pet. 13-20. Sidley showed that this is an important and recurring issue of law, *id.* at 20-23, and that, in resolving that question, the Seventh Circuit misread this Court's decision in *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279 (2002). Pet. 23-26. None of the EEOC's arguments undermines these showings or the need for certiorari.

First, the EEOC's claim that the decision below "does not conflict with the decision of any other court of appeals" is unsupportable. Opp. 6. The Seventh Circuit's ruling that the EEOC could proceed with claims for individual relief turns on its holding – what it called the "doctrinal heart of *Waffle House*" – that "the EEOC is not in privity with the victims for whom it seeks relief." Pet App. 3a. In direct conflict, the Fifth and Third Circuits have prevented age-discrimination claims from proceeding because those courts held that the EEOC is "in privity with individuals for whom it seeks relief." *Vines* v. *University of La.*, 398 F.3d 700, 708 (5th Cir 2005), *cert. denied*, 126 S. Ct. 1019 (2006); *EEOC* v. *U.S. Steel Corp.*, 921 F.2d 489, 496 (3d Cir. 1990) (same).

The EEOC ignores this direct conflict on the core issue of "privity." If the Fifth or Third Circuits had adopted the Seventh Circuit's rule that the "EEOC is not in privity with the victims for whom it seeks relief," Pet. App. 3a, then *Vines* and *U.S. Steel* would have been decided differently. *Vines*, 398 F.3d at 706 (appeal "hinges on whether EEOC was in privity with Vines"); *U.S. Steel*, 921 F.2d at 493 ("The issue we must consider . . . is whether the private plaintiffs and the Commission are in privity."). Conversely, if the Seventh Circuit had agreed with *Vines* and *U.S. Steel* that the EEOC is

in "privity" with the individuals on whose behalf it seeks relief, then summary judgment would have been granted because the Seventh Circuit previously resolved the "identical question" by barring the EEOC from seeking individual relief. Pet. App. 2a (citing *EEOC* v. *North Gibson Sch. Corp.*, 266 F.3d 607 (7th Cir. 2001)). Indeed, the reason that the court below rejected *North Gibson* was its view that, under *Waffle House*, "the EEOC is not in privity with the victims for whom it seeks relief." Pet. App. 3a. In short, different circuits are applying fundamentally different rules of law that are outcome determinative. That situation cries out for this Court's review.

Second, the EEOC's suggestion that "[t]he interlocutory nature of the ruling provides a sufficient basis to deny review" is pure makeweight. Opp. 6-7. In *Waffle House*, the EEOC itself sought (and was granted) review of an interlocutory court of appeals decision because it involved a circuit conflict over the scope of the EEOC's enforcement authority under the federal anti-discrimination laws. 534 U.S. at 285. Countless decisions of this Court confirm that "the interlocutory status of the case" is no bar to certiorari where, as here, "the court below has decided an important issue, otherwise worthy of review," and where review by this Court "may serve to hasten or finally resolve the litigation." Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 260 (8th ed. 2002) (citing cases).

Here, the district court and court of appeals both properly concluded that (i) the question presented is one that is "important . . . for a broad range of institutions beyond the one which is litigating here" and (ii) immediate resolution of that issue would "speed up the litigation." Pet App. 14a-15a (district court); *id.* at 2a (court of appeals; district court order "satisfies . . . 28 U.S.C. § 1292(b)"). And, as the Chamber of Commerce of the United States makes clear, uniformity on this issue is of critical importance to businesses and workers nationwide. *See* Brief of the Chamber of Commerce of the

United States of America as *Amicus Curiae* at 2-3, 4-15 (July 21, 2006). The time to resolve the issue presented is now.

Finally, the EEOC's merits-based arguments, Opp. 6, 8-10, provide no basis for declining to resolve this circuit conflict. To the contrary, the EEOC's selective analysis of the Age Discrimination in Employment Act's ("ADEA's") statutory scheme underscores that the decision below utterly ignored the statutory text. Further, this belated effort to provide support for the decision below – culminating in the EEOC's startling conclusion that a final judgment against the EEOC "does not bar an individual from litigating his own ADEA claim," *id.* at 12 n.2 – has been rejected by the Fifth and Third Circuits. Likewise, the EEOC's analysis finds no support in *Waffle House* or any other decision of this Court. Indeed, the EEOC's view that it can seek individual relief for persons who, for "legitimate reasons," have decided not "to file charges," *id.* at 9, would cripple efforts by private parties to settle such disputes without EEOC involvement and thereby undermine the ADEA's goal of "help[ing] employers and workers find ways of meeting problems arising from the impact of age on employment," 29 U.S.C. § 621(b).

ARGUMENT

I. THIS CASE SQUARELY IMPLICATES A CONFLICT AMONG THE CIRCUIT COURTS ON A RECURRING AND IMPORTANT ISSUE.

1. Contrary to the EEOC's arguments, this case squarely implicates an outcome determinative conflict among the courts of appeals. In *Vines*, the Fifth Circuit explained that its decision whether to foreclose plaintiffs from proceeding with claims for individual relief "hinges on whether the EEOC was in privity with [the individual plaintiffs]." 398 F.3d at 706. Based upon a review of the ADEA's statutory text, the *Vines* court held that "[w]hen the EEOC seeks private benefits for individuals under the ADEA, it takes on representative responsibilities that plac[e] it in privity with those

individuals." *Id.* at 707. In *U.S. Steel*, the court explained that the dispositive issue was "whether the private plaintiffs and the Commission are in privity." 921 F.2d at 493. On that issue, the Third Circuit held that the language and structure of the ADEA refuted the EEOC's position that it "is not in privity with individuals on whose behalf it maintains ADEA actions." *Id.* at 496; *id.* at 495 ("the conclusion that the EEOC is the individual's representative in ADEA suits . . . seems inescapable"). In direct conflict, the Seventh Circuit here ruled that the EEOC could proceed with its claims because "the EEOC is not in privity with the victims for whom it seeks relief." Pet. App. 3a.

Resolution of this conflict controls the outcome in these cases. The *Vines* and *U.S. Steel* courts precluded further litigation to obtain individual-specific relief based on their conclusions that the EEOC is in privity with the individuals on whose behalf it seeks relief. *Vines*, 398 F.3d at 706-08; *U.S. Steel*, 921 F.2d at 496.[1] As such, the rulings in *Vines* and *U.S. Steel* would have been completely different if the Fifth or Third Circuits had agreed with the Seventh Circuit on the issue of privity. Pet. App. 3a.

Likewise, the court below recognized that its prior decision in *North Gibson* would have foreclosed the EEOC's claim for individual relief if that decision were unaffected by *Waffle House*, as Sidley argued below and here. Pet. App. 2a. The court below ruled, however, that *North Gibson* had been "scuttled" by *Waffle House* on the issue of privity. *Id.* at 2a, 3a. Thus, if the court below had applied the law set forth in *Vines* and *U.S. Steel*, it would have followed *North Gibson* and foreclosed the EEOC's claims for individual relief.

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[1] Although the EEOC's brief omits any mention of "privity," the United States last year told this Court that *Vines* was wrong because the Fifth Circuit improperly concluded that "the EEOC is in privity with an individual when it seeks recovery for that individual." Brief for United States as *Amicus Curiae* at 8, *Vines*, No. 04-1615 (U.S. Dec. 2005).

The EEOC insists that there is no conflict because there "has been no prior action involving the claims raised by the EEOC in this case." Opp. 11. The Seventh Circuit itself has rejected that purported distinction, explaining that the EEOC cannot seek recovery on behalf of individuals who fail to file charges because (i) if any of these individuals had initiated a lawsuit, it would have been dismissed for "failure to comply with the statutory filing requirement," *North Gibson*, 266 F.3d at 616, and (ii) then the prohibition "on the EEOC's subsequent relitigation of the same claims would apply squarely," *id.* at 617. The decision below did not disturb that analysis, but instead disagreed with *North Gibson*'s antecedent ruling that "the EEOC is in privity" with the individuals for whom it seeks "monetary relief." *Id.* at 616.

Finally, the EEOC argues that there is no conflict with *Vines* and *U.S. Steel* because the decision below "left open the possibility that collateral estoppel would bar an individual who sues and loses from obtaining relief in an EEOC action." Opp. 12. That suggestion is illusory. Governing precedent dictates that collateral estoppel *requires* a showing of privity. *E.g.*, *Haring* v. *Prosise*, 462 U.S. 306, 317 n.10 (1983) ("collateral estoppel may only be asserted by persons who were either a party or privy to the prior action"); *Kraushaar* v. *Flanigan*, 45 F.3d 1040, 1050 (7th Cir. 1995) ("collateral estoppel can be used to bind only those persons who were parties or who are in privity with parties to the prior proceeding"). Consistent with this settled law, the EEOC's position is that "a judgment against the EEOC does not bar an individual from litigating his own ADEA claim." Opp. 12 n.2.

2. The EEOC also highlights a series of other circuit decisions in support of the unremarkable proposition that "the failure of an individual to file a charge does not preclude the EEOC from filing suit." Opp. 10. That argument is irrelevant because Sidley does not contend that "the failure of the 32 individuals to file charges under the ADEA prevents the EEOC from seeking injunctive relief." Pet. 9. The issue here

is whether conduct of individuals can preclude the EEOC from recovering *individual* relief on their behalf.

On that question, the cases cited by the EEOC say nothing. In *EEOC* v. *Johnson & Higgins, Inc.*, 91 F.3d 1529 (2d Cir. 1996), the court dealt only with the district court's grant of injunctive relief, and remanded the case to consider "what additional relief, if any," might be appropriate. *Id.* at 1542-43. Likewise, *EEOC* v. *American & Efird Mills, Inc.*, 964 F.2d 300, 302 (4th Cir. 1992), and *EEOC* v. *Tire Kingdom, Inc.*, 80 F.3d 449, 451 (11th Cir. 1996) (per curiam), addressed whether the EEOC could *investigate* absent an employee charge, not whether the EEOC could obtain individual-specific relief on behalf of individuals who were barred from obtaining such relief for themselves. These cases cast no doubt on the clear conflict among the circuits on the question presented in this case.

II. THE PROCEDURAL POSTURE OF THIS CASE IS NO BAR TO REVIEW.

The EEOC is mistaken in arguing that "the interlocutory nature of the ruling provides a sufficient basis to deny review." Opp. 6. This Court regularly grants review of cases that are interlocutory. What is particularly ironic is that, in *Waffle House*, this Court granted the EEOC's petition for review of an interlocutory ruling that implicated a circuit conflict on the question whether an agreement to arbitrate between an employee and employer prevented the EEOC from seeking individual relief on behalf of the employee under the Americans With Disabilities Act ("ADA"). 534 U.S. at 285. The interlocutory posture of a decision simply is no "impediment to certiorari" where the court of appeals "has decided an important issue, otherwise worthy of review" and where final resolution of that issue "may serve to hasten or finally resolve the litigation." Stern, *supra* § 4.18, at 260.[2]

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[2] *E.g.*, *Sumitomo Shoji Am., Inc.* v. *Avagliano*, 457 U.S. 176 (1982) (Title VII); *Lehman* v. *Nakshian*, 453 U.S. 156 (1981) (ADEA); *General*

Here, the issue presented – whether the conduct of individuals can bar the EEOC from seeking individual relief on their behalf – is an important and recurring issue of federal law that warrants this Court's review. That issue has generated a conflict among the courts of appeals of the sort that warranted review in *Waffle House* and myriad other cases. Further, resolution of this issue "may serve to hasten or finally resolve the litigation." *Id.* Confining the scope of this case to the EEOC's claim for injunctive relief (i) would limit the need for discovery of sensitive information relating to the former law partners whose claims are at issue here, and (ii) would increase the potential for settlement. Indeed, both the district court and Seventh Circuit agreed that immediate review "may materially advance the ultimate termination of the litigation" when they certified this appeal under 28 U.S.C. § 1292(b). Pet. App. 2a, 15a; see Stern, *supra*, § 4.19, at 261 (noting relationship between interlocutory appeal under § 1292(b) and criteria for granting certiorari).

III. THE EEOC'S ARGUMENTS CONCERNING THE MERITS CONFIRM THE NEED FOR REVIEW.

The EEOC's discussion of its view of how this case should be decided, Opp. 8-10, provides no basis for denying review. Rather, the EEOC's analysis confirms that the circuit conflict is intractable, misapprehends this Court's decisions, and, if accepted, would thwart the goals of the ADEA by undermining the ability to resolve disputes voluntarily.

1. The EEOC's statutory arguments underscore that the Seventh Circuit's decision utterly ignored the ADEA's statutory text. Pet. App. 2a-3a (relying exclusively on *Waffle*

Tel. Co. of the Nw., Inc. v. *EEOC*, 446 U.S. 318 (1980) (Title VII); *Lorillard* v. *Pons*, 434 U.S. 575, 577 (1978) (ADEA). None of the cases relied upon by the EEOC, Opp. 6-7, is remotely similar to this case. *E.g.*, *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (equal protection); *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967) (per curiam) (arbitration); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251 (1916) (trademark).

House, an ADA case). The EEOC attempts to fill that void, albeit selectively, by arguing that subsections (a), (b) and (d) of 29 U.S.C. § 626 allow the EEOC "to determine whether it is in the public interest to seek relief" even if the former law partners in this case may have "legitimate reasons" for declining to file charges. Opp. 8-9.[3]

Absent from the EEOC's analysis is any discussion of subsection (c), which directs that "the right of any person to bring such actions shall terminate upon the commencement of an action by the [EEOC] to enforce the right of such employee under [the Act]." 29 U.S.C. § 626(c)(1). In *U.S. Steel*, then-Judge Alito analyzed § 626(c) and explained that

> Congress would not have crafted this enforcement scheme – on the one hand, creating an individual cause of action and, on the other, cutting off the individual's right to sue once the EEOC begins its action – unless Congress intended for the EEOC to serve as the individual's representative when it seeks to enforce that individual's rights.

921 F.2d at 494-95. Likewise, in *Vines*, the Fifth Circuit followed *U.S. Steel* to conclude that the ADEA's "statutory enforcement mechanism" "places the EEOC in privity with individuals for whom it seeks relief." 398 F.3d at 708. Neither the EEOC nor the Seventh Circuit has made any effort to square their position that the "EEOC is not in privity with the individuals for whom its seeks relief" with conflicting decisions that actually analyze the ADEA's text.

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[3] The EEOC challenges the Question Presented, arguing, *inter alia*, that the decision below addressed the EEOC's ability to "'obtain monetary relief'" under the ADEA, whereas the question presented encompasses the "'more general question'" of the EEOC's authority "'under the federal antidiscrimination laws.'" Opp. 12. That criticism is unfair. The Seventh Circuit's decision in this ADEA case (Pet. App. 2a-3a) was based on its reading of *Waffle House*, which involved a claim under the ADA, and *Waffle House* itself relied on cases interpreting Title VII, yet another federal antidiscrimination statute. 534 U.S. at 285-88.

2. Nor is the ruling below supported by this Court's decisions. Opp. 9-10. *Waffle House* expressly provides that an individual's "conduct may have the effect of limiting the relief that the EEOC may obtain in court," 534 U.S. at 296, and explains that "ordinary principles of res judicata, mootness, or mitigation may apply to EEOC claims," *id.* at 298. This Court's acknowledgement that the EEOC's ability to recover is not *in all* cases "merely derivative" of the rights of private individuals, *id.* at 297, is a far cry from the categorical ruling by the court below that *Waffle House* holds that EEOC "enforcement authority is not derivative of the legal rights of individuals even when it is seeking to make them whole." Pet. App. 2a.

Likewise, *Tony & Susan Alamo Foundation* v. *Secretary of Labor*, 471 U.S. 290 (1985), does not support the EEOC. The *Alamo* Court held that the minimum wage and overtime requirements of the Fair Labor Standards Act ("FLSA") apply even where affected persons testified that they were volunteers rather than employees. *Id.* at 302. The Court explained that "the purposes of the [FLSA] require that it be applied even to those who would decline its protections" because otherwise "employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive protections under the [FLSA]." *Id.*

Alamo has no application here because the FLSA and ADEA differ in critical respects. Unlike the FLSA, which the *Alamo* Court explained prohibits waivers, *id.*, the ADEA expressly authorizes waivers by private parties. 29 U.S.C. § 626(f). Further, unlike the FLSA, "prior to the initiation of any ADEA action, an individual must give notice to the [EEOC]" by filing a timely charge. *Lorillard* v. *Pons*, 434 U.S. 575, 579-80 (1978); *see also* 29 U.S.C. § 626(c).

Circuit courts likewise have held that *Alamo* is inapplicable to cases under the ADEA because "[t]he purposes behind enactment of the ADEA and . . . FLSA are . . . obviously different." *Runyon* v. *National Cash Register Corp.*, 787 F.2d

1039, 1043 & n.6 (6th Cir. 1986) (en banc); see *O'Hare* v. *Global Natural Res., Inc.*, 898 F.2d 1015, 1016-17 & n.1 (5th Cir. 1990); *Lancaster* v. *Buerkle Buick Honda Co.*, 809 F.2d 539, 540 (8th Cir. 1987). In particular, the FLSA "protects the lowest paid workers whereas the ADEA protects a different class of employees many of whom are 'highly paid and capable of securing legal assistance without difficulty.'" *O'Hare*, 898 F.32 at 1017 n.1 (quoting *Runyon*, 787 F.2d at 1043). That distinction is particularly apt in a case involving the EEOC's efforts to recover individual benefits on behalf of former law partners who chose to forgo their rights to file charges under the ADEA.

3. Lastly, the Seventh Circuit's acceptance of the EEOC's position that its right to recover against a defendant is independent of the "legal rights of individuals even when it is seeking to make them whole," Pet. App. 2a, utterly undermines the ADEA's goal of resolving disputes without the need for agency involvement. 29 U.S.C. § 626(f) (authorizing waiver of rights under the ADEA); *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28-29 (1991) (ADEA reflects "flexible approach to resolution of claims," including settlement of disputes "without any EEOC involvement"); *Runyon*, 787 F.2d at 1043 (approving of "settlements of ADEA disputes that employees and employers have worked out in good faith without agency involvement"). As the Chamber of Commerce explains, if the EEOC's right to seek individual-specific relief is divorced from the rights of individuals who decline to file charges or otherwise settle their claims, then there will be little incentive for private parties to resolve their disputes voluntarily. See *Amicus Curiae* Chamber of Commerce, at 13-14.

CONCLUSION

For these reasons, and those set forth in the Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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